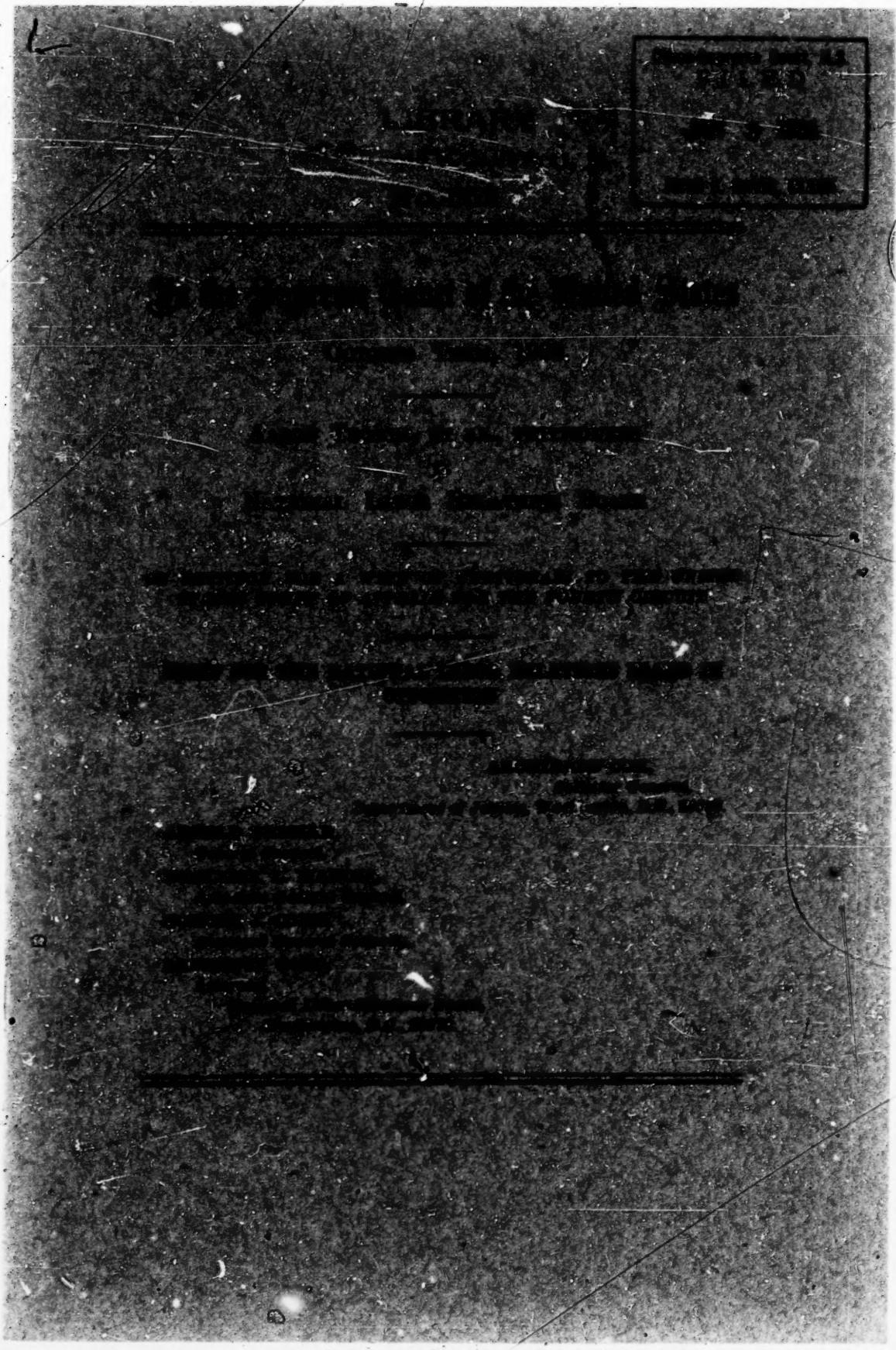

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717-041—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 652

AARON TROSCH, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–10a) is reported at 321 F. 2d 692. The Board's decision and order (J.A. 1–14)[1] are reported at 138 NLRB 215.

JURISDICTION

The decision of the court of appeals was entered on August 19, 1963. On November 16, 1963, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including

[1] "J.A." refers to the Joint Appendix in the court of appeals which has been filed with the Clerk.

December 1, 1963, and the petition was filed on November 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's finding—that the company violated Sections 8(a) (1), (2), and (3) of the National Labor Relations Act by recognizing and bargaining with the Association as the exclusive representative of its employees at a time when the Association had not been so designated by a majority of the employees—is supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

a. The Board's findings of fact.—The Maryland News Company is engaged in the wholesale distribution of magazines, books, periodicals, and newspapers in Baltimore, Maryland. On January 6, 1961, Local 590[2] filed a petition with the Board's Regional Office seeking certification as the representative of 30 of the Company's employees (J.A. 3; 95–96). At a hearing held on that petition, the company contended that the appropriate unit should include a total of 60 employees (J.A. 3; 29–31). On January 30, Local 590

[2] Warehouse, Retail and Mail Order Employees Local Union No. 590, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

withdrew its petition, but thereafter, on February 1, filed a second petition, seeking a unit consisting of 32 employees (J.A. 3; 21, 30, 92–93). A hearing was held on this petition on February 27, and again the Company denied the appropriateness of the unit sought by Local 590 (J.A. 3; 23, 31, 94).[3]

From February 28 to March 3, 1961, Local 590 picketed the Company premises (J.A. 3; 31–32, 66). During the period of the picketing, Philip Appel, an employee of the Company, prepared and circulated among the employees a document reading "We the undersigned, including those who have signed Union Cards and those who have not signed Union Cards, hereby withdraw our Membership and demand that the picket line at Maryland News Company be removed" (J.A. 3–4; 65–66, 102). This document was signed by approximately 50 of the employees (J.A. 4; 33). Thereafter, Appel gave a copy of the document to Melvin Trosch, the Company's executive director (J.A. 4; 27). While the picketing was in progress, Appel and certain other employees went to Local 590's office on several occasions and requested the return of their union cards (J.A. 4; 68–72). Local 590 refused to return the cards (*ibid.*).

About May 15, 1961, approximately 2½ months after the picketing ended, a meeting attended by 18

[3] The filing of the instant unfair labor practice case caused further proceedings on the representation petition to be suspended. See *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209, note 2 (C.A. 9), and the cases cited therein. Thus, no determination has yet been made as to what would constitute an appropriate unit for the Company's employees.

of the Company's employees was held after working hours in a back room on the Company's premises.[4] Those at the meeting, by majority vote, formed the Maryland News Employees Association, and elected officers (J.A. 4; 43–49, 72). Employee Toussaint M. Wallace was elected chairman of the Association (J.A. 4; 73). Ostendorf, an attorney, counted the votes (J.A. 47, 51, 73) and later prepared bylaws for the Association (J.A. 59–60, 73).

During May, Melvin Trosch was approached by Appel and Ostendorf on separate occasions on behalf of the Association (J.A. 33–34). Ostendorf stated that he was the attorney for the Association and asked Trosch to recognize and sign a contract with the Association. Toward the end of May, Ostendorf turned over to Wallace, the Association chairman, a contract he had prepared for the Association (J.A. 4; 53). Wallace and a committee of four other employees presented the proposed agreeement to Trosch (*ibid.*). Trosch rejected the contract. The committee held several more meetings with him, however, and finally at a meeting on June 5 or 6 Trosch presented the committee with a contract he had prepared (J.A. 4; 53–54). The committee at that time assured Trosch that it represented a majority of the employees, but Trosch did not request any proof of these claims (J.A. 5; 27–28). As Wallace testified, "We had no actual proof, if you're talking about written authorization as representa-

[4] The Trial Examiner credited the testimony of employee Wallace, who was elected Chairman, that 18 employees attended the meeting of May 15, rather than Appel's testimony that 30 were present (J.A. 6).

tion. We didn't have—we just told him in general that we represented the group. That's all. It was all verbal" (J.A. 61). The contract offered by Trosch, which contained a provision requiring the employees to become members of the Association, was accepted by the members of the bargaining committee and signed by them (J.A. 88). Subsequently, at Trosch's request, the contract was circulated among the employees and signed by 53 of them (J.A. 4; 63, 101).[5]

b. The Board's conclusion and order.—The Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a) (1) and (2) of the Act by recognizing, and contracting with, the Association as the exclusive bargaining representative of its employees at a time when the Association did not represent a majority of the employees covered by the contract, and when a real question concerning representation and the appropriateness of the bargaining unit was under investigation in a pending Board proceeding. The Board also concluded that the Company violated Section 8(a) (3) and (1) of the Act by agreeing to, and maintaining, a contract provision which required membership in the unlawfully assisted Association as a condition of employment. Finally, the Board concluded that the aforesaid union-security clause was invalid under Section 8(a) (1), (2), and (3) in that it did not provide for a

[5] The negotiations between the Company and the spokesmen for the Association appear at all times to have been based on a unit of 60 employees—the unit which the Company throughout had urged was the appropriate one for purposes of collective bargaining (J.A. 5: 35).

30-day statutory grace period for "the then employees" (J.A. 8, 11).*

The Board ordered the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with the statutory rights of its employees. Affirmatively, the Board directed the Company to withdraw and withhold recognition from the Association as collective bargaining representative of any unit of its employees and to cease giving effect to the bargaining contract with it, unless and until the Association was certified by the Board as the representative of the employees. The Company was further ordered to post appropriate notices (J.A. 1, 11–14).

c. The decision of the court of appeals.—The court of appeals held that substantial evidence supported the Board's finding that the Company recognized and bargained with the Association when it had not been designated by a majority of the employees as their bargaining representative, and that therefore, under *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, the Company's action violated the Act. The court also found that under the *Midwest Piping and Supply Co.* doctrine (63 NLRB 1060), the Company violated the Act because it recognized and thereby favored one of two competing unions at a time when a real question concerning representation was pending before the Board. Finally, the court held that the Company violated the Act by

* The Company apparently does not contest in this Court the finding that the union security clause was invalid on its face (see Pet. 2, 4).

entering a contract which failed to provide a 30-day grace period for present employees to join the Association and which compelled membership in a minority union as a condition of employment. The court thus enforced the Board's order in full (Pet. 1a–10a).

ARGUMENT

1. This Court held in *International Ladies' Garment Workers' Union v. National Labor Relations Board*, 366 U.S. 731, 736, that an employer violates the Act when it accords exclusive recognition to a union that has not been designated by a majority of the employees as their bargaining representative. Petitioners contend that the Company recognized and bargained with the Association after being presented with "conclusive evidence" that it represented a majority of the employees (Pet. 4, 5). This is contrary to the finding made by the Board and sustained by the court of appeals that the Company recognized the Association at a time when it was not clear that it represented a majority of the employees (J.A. 5–7; Pet. 6a). The resolution of an evidentiary issue of this type does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the record shows that, though the Association claimed to represent a unit of 60 employees, its largest meeting attracted only 18 employees, not all of whom voted in favor of forming a union (J.A. 5–6; 43–49, 61). The Board found that the "testimony as to whether other employees joined with the group of 18 is too vague to permit drawing an inference that the Association did obtain authoriza-

tion from a sufficient number of employees to warrant the committee's assertion of majority representation" (J.A. 6). Moreover, Wallace, the chairman of the Association, conceded that he had no written authorizations from the employees to support the Association's recognition claim (J.A. 61). The petition signed by the employees disclaiming any interest in Local 590 (J.A. 5; 27–28) evidences their disenchantment with that union but does not prove their desire to be represented by the Association. The fact that most of the employees signed the contract establishing a union shop with the Association (J.A. 4; 63, 101) was not relevant since the Company had previously recognized the Association by negotiating and agreeing to a contract with it. This Court made clear in *International Ladies' Garment Workers' Union, supra,* 366 U.S. at 736, that, if an initial grant of recognition is unlawful, it is immaterial that the union later represented a majority of the employees. Thus, in the circumstances of this case, the Board was warranted in concluding that it was not established that the Association represented a majority of the employees at the time exclusive recognition was first accorded to it.

2. Petitioners contend (Pet. 5–7) that its recognition of the Association was justified because, if they had not acted as they did, Local 590's petition with the Board would have forestalled adequate representation for the Company's employees for a long period of time. It is true that the *Midwest Piping* doctrine (*supra*, p. 6) would have prevented the Company from recognizing

the Association even if it appeared to represent a majority of the Company's employees, as long as a real question of representation, raised by Local 590's petition was still before the Board. A real question exists where, consistent with the Board's procedure (29 CFR 101.18), the petitioning union shows that the petition is filed on behalf of 30 percent of the employees in the appropriate unit, even though the union is later found not to represent a majority of the employees. Petitioners' implicit attack on the *Midwest Piping* doctrine—that it requires an employer to delay recognizing another union which in fact represents a majority of employees—is not actually raised by this case. As we have seen, the Company did not have any sound basis for believing the Association represented a majority of employees at the time the Company recognized it. There can be no excuse for foisting on employees a union which a majority of them have not selected.[7]

Moreover, even if the Association had appeared to represent a majority of the employees, the dilemma which petitioners assert under the *Midwest Piping* doctrine could have been largely avoided. Had the Company not prematurely accorded recognition to the Association, there would have been no unfair labor practice to block the representation proceeding and the Board

[7] The Fourth Circuit's view, which is stated in the decision below (Pet. 8a–9a), is that, notwithstanding the pendency of a petition, a real question of representation does not exist if the employer has conclusive proof that a union represents a majority of employees. This disagreement between the Board and the Fourth Circuit is not involved here since, as the Fourth Circuit found, the Company did not have proof that the Association represented a majority of employees.

could have promptly determined whether to direct an election in the unit sought by Local 590 or to dismiss the petition. Had the Board directed an election and had Local 590 lost, or if the Board had dismissed Local 590's petition, the Company would then have been free to recognize the Association, if that union were able to establish, as it failed to do here, that it in fact represented a majority of the employees in an appropriate unit.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

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JANUARY 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * * * *
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit ap-

propriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment * * *.

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